F. M. S. R.

[ORIGINAL CIVIL JURISDICTION]
BURTON, J.
April 12, 1934.

KARTHIGASU ARUMUGAM.....Plaintiff
v.
A. SELVADURAI }
J. K. R. LEONARD }.....Defendants

[NEGRI SEMBILAN CIVIL SUIT No. 112 of 1933]

The Land Code, 1926, sections 149, 151 and 152—Auction sale of land—Property forthwith resold in default of payment of deposit under the Conditions of Sale—Meaning of "forthwith"—The Civil Procedure Code, 1918, sections 40 and 254.

In an auction sale of land held under sections 151 and 152 of the Land Code, 1926, one of the conditions of sale was as follows:—

> "Immediately after the fall of the hammer the purchaser shall pay to the auctioneer a deposit of 25 per centum on the amount of his purchase money and in part payment thereof and shall sign the memorandum at the foot of these conditions. In default of payment of such deposit the property shall forthwith be again put up for sale and the deficiency in price (if any) which may result on a re-sale or the purchase money, if there is no re-sale, as the case may be, shall be recoverable from the defaulting purchaser."

The sale took place on the advertised date in the open air near the Court House where such auctions are always held and the purchaser, having signed the auctioneer's Contract of Sale, went to the Court House to pay the required deposit.

The cheque, tendered in payment of the deposit, was not accepted and after a short delay the property was put up for sale again at the original place of auction.

In this suit contesting the validity of the sale,

Held, that since it is a universal practice in this country to hold such sales in the open air and to pay the deposit at the Court House, there had been no undue delay in re-selling the property, and that on the facts proved there had been compliance with the provisions of the condition of sale set forth above.

Held further, that an order for sale under section 149 of The Land Code, 1926, is not within the definition of the word "decree" in The Civil Procedure Code, 1918.

Decision in *Chettiappah Chetty* v. *Raja Abdul Rashid*, (1931-1932) F.M.S.L.R. 345, followed.

Decision in *Leonard* v. *Arumugam* 3 Mal. L.J. 93 dissented from and not followed.

W. G. W. Hastings and *V. Mackie* for the plaintiff.

First defendant in person.

B. J. B. Joaquim and *R. Ramani* for the second defendant.

Cur. Ad. Vult.

BURTON, J.—The plaintiff, Arumugam, is the owner of Sri Lanka Estate near Port Dickson and a dwelling house in Circular Road, Seremban. He had already charged Sri Lanka Estate to the Ho Hong Bank and the dwelling house to the F. M. S. Benefit Society, and on the 29th June, 1928, he signed a second charge of both properties in favour of Leonard, the second defendant, for $25,000 and interest. Arumugam repaid $10,000 but made the default; sale was ordered by the Court and the sale was fixed for 14th July, 1933, on which date the amount outstanding on the second charge, was $17,340.

This suit is concerned with the validity of this sale; the plaintiff complains of nothing before the actual date of the sale. He admits that everything was done by way of proclamation and advertisement to attract bidders.

The sale took place on the advertised date in the open air under a tree near the Court House in Seremban. There were some fifteen to twenty bidders present, but no one took part in the bidding except Leonard and Selvadurai, the first defendant, a nephew of the plaintiff. Leonard opened the bidding at $18,370 and Selvadurai advanced his bids by $2 or $1 until the property was knocked down to him at $20,301. Selvadurai signed on the spot the Memorandum of Contract given at the foot of the Conditions of Sale. Then the auctioneer asked Selvadurai for the 25 per cent. deposit in the terms of condition 3 of the Conditions of Sale, and upon Selvadurai saying that he would give a cheque for the amount, the auctioneer took him to the Registry. The Court Bailiff did not go, but remained on the spot to hold another sale.

At the Registry Dr. Tilliampalam drew a cheque on the Kwong Yik Bank at Kuala Lumpur in favour of Selvadurai, and it was endorsed by Selvadurai to the Assistant Registrar and handed by him to the auctioneer. It happened to be Friday, and the Assistant Registrar was absent from his office at Mosque, so that he could not have endorsed the cheque till his return at 2 p.m. and as it would have had to be cleared through the Treasury, it would probably have taken till the following Monday to ascertain whether or not it would be honoured. Mr. Yong Shook Lin seems to have had suspicions of the financial stability of Dr. Tilliampalam, and they were justified to this extent that it is proved that he only had 30 cents in his account to meet this cheque at the time he drew it, though I think it is quite clear that he had money to meet the cheque next day. An argument took place in the Registry, during which the Bailiff, who had disposed of the intermediate sale, returned.

Mr. Yong Shook Lin insisted on the cheque being made out to the auctioneer, but Dr. Tilliampalam refused. The cheque was not accepted, and accordingly no deposit was made in the terms of condition 3. The Bailiff, the auctioneer, Leonard, and Yong Shook Lin returned to the place of auction, the Bailiff re-opened the bidding and continued the sale of the land. There appear to have been one or two other people present at the continuation of the sale besides Leonard; Leonard states that there were there Saravanamuthu, Yong Yu Lin and some other Jaffna Tamils. The plaintiff also was present and made a protest. But I am satisfied that his protest was against the continuation of the sale not

because the bidders had dispersed or that there was any irregularity, but because he wished Dr. Tilliampalam's cheque to be accepted. The proceedings at the continuation of the sale were short. The land was put up at $20,300. After a few minutes Leonard bid $20,310 and the land was knocked down to him.

It is this re-opening of the sale which is the centre of conflict in this case. Selvadurai has already sued Leonard and the Bailiff in Seremban Civil Suit No. 80 of 1933, the material papers in which are exhibited, for a declaration that the first sale in which the land was knocked down to Selvadurai was a good and valid sale, and judgment has been given against him. I am told that the judgment in that suit is under appeal.

Condition 3 is as follows:—

> "Immediately after the fall of the hammer the purchaser shall pay to the auctioneer a deposit of 25 per centum on the amount of his purchase money and in part payment thereof and shall sign the memorandum at the foot of these conditions. In default of payment of such deposit the property shall forthwith be again put up for sale and the deficiency in price (if any) which may result on a re-sale or the purchase money, if there is no re-sale, as the case may be, shall be recoverable from the defaulting purchaser."

The plaintiff's case is that it was the duty of the Bailiff to re-open the bidding "forthwith" and that the adjournment to the Registry led people to believe that the sale was at an end, and that consequently the public dispersed, and that the sale as continued was a farce. It is clear that there were some fifteen or twenty people present at the first sale, but I accept Mr. Yong Shook Lin's evidence that none of them bid except Selvadurai and Leonard, and that none of them looked in the least like potential bidders.

But among the crowd at the first sale was a Government pensioner named Ampalavanar who says that he represented a syndicate consisting of Goh Eng Thye, Goh Lian Chan, himself and two other Ceylon Tamils who have to remain anonymous because they are in Government service, and are forbidden to speculate in land. The story is that this syndicate after inspection and discussion decided to bid up to $23,000/—, and that on the morning of the 14th July, Ampalavanar attended at the place of sale to bid on behalf of the syndicate. He gives as the reason why he did not bid at the sale when Selvadurai bought that Selvadurai asked him not to bid because he wished to buy in his uncle's property.

I have very anxiously considered the evidence for this syndicate. The witnesses who speak to it Ampalavanar, Goh Eng Thye and Goh Lian Chan are men of substance and position in Seremban; and I am clearly of opinion that the story cannot be rejected *in toto*. But I am equally clear that it cannot be accepted in all its details. The evidence of Selvadurai I regard as of little or no probative value. Hereford, J., in Seremban Civil Suit No. 80 of 1933 stigmatised him as a man of straw; and for my part I should require much stronger proof than his own statement to convince me that he has property in Ceylon. He admits that he has none in this country. Neither do I feel justified in placing much reliance on Ampalavanar's evidence.

On the whole evidence I am satisfied that a project to purchase this estate was considered, that Goh Eng Thye and Goh Lian Chan went to see the property and that preliminary discussions took place. I see no reason to doubt that they decided that they could bid up to $23,000/—. But I have come to the conclusion that the syndicate was never properly formed, and that Ampalavanar did not attend the sale as the agent of the syndicate to bid on its behalf.

I find corroboration of this conclusion because neither the shares nor the members of the syndicate were definitely settled,—Goh Lian Chan states that he was expected to bring two friends from Malacca to join but neither Goh Eng Thye nor Ampalavanar knew anything of them,—because of the prevarications of Ampalavanar when questioned as to his reasons for not bidding; because no satisfactory arrangements had been made to pay the deposit of 25 per cent in the event of purchase, and because neither Goh Lian Chan nor the anonymous Tamils were consulted before Ampalavanar withdrew from the bidding. I do not think that Goh Eng Thye was consulted. Moreover Mr. Crawford values the estate at $40,926/—, and it is clearly a first-class property. I regard it as quite improbable that Goh Eng Thye and Goh Lian Chan would consent to forego an excellent bargain for what is at best a sentimental reason, which is not (even if true) likely to appeal to two Chinese business men. But I have come to the conclusion that Ampalavanar's reason for not bidding is not the true one.

The word "forthwith" has been defined in *Ex parte Lamb*, 19 Ch. D. 169, at page 173 where Jessel, M.R., says:—

> "I think that the word "forthwith" must be construed according to the circumstances in which it is used. When as in *Hyde* v. *Watt*, there is a covenant to insure a man's life, there must of necessity be some delay, for the act could not be done in a moment. But where an act which is required to be done "forthwith" can be done without delay, it ought to be so done."

and Lush, L. J.

> "The word "forthwith" has not a fixed and absolute meaning; it must be construed with reference to the objects of the rule and the circumstances of the case."

In this case there was no undue delay. It is the universal practice in this country to call

such sales in the open air; and it is equally the universal practice for the deposit to be paid in the Court office to the Bailiff or the Registrar. The auctioneer has no status in this class of case. The "officer of the Court" (see sections 151 and 152 of the Land Code) is in charge of the sale and only takes the assistance of an auctioneer.

As soon as the land was knocked down to Selvadurai, the contract note was signed and the parties went to the Registry to pay the deposit. A dispute ensued which must have taken some time, but immediately after the dispute had ended, the Bailiff returned to the scene of the sale and continued the bidding at the last undisputed bid. I do not see what more the Bailiff could have done, and I do not see how else he could have complied with the third condition. It is clear on my finding that there were no proved bidders who dispersed between the sale and the continuation, and there is no complaint against the methods of advertisement of the sale. Apart from the syndicate, there was no reasonable likelihood of a bidder coming in after the sum of $20,300/- who had not attempted to bid before. There is evidence that the bidding between Leonard and Selvadurai was prolonged to something like fifty bids. I conclude, therefore, that there was no irregularity in the sale.

But even apart from this, even if we assume that Ampalavanar's story is true, I do not think that the plaintiff can succeed for that reason. There is no doubt that the conditions of sale were sufficiently communicated to the public at the time of the sale. They were read out in English and Malay, and a dispute occurred as to whether they should also be read out in Tamil and Chinese. Ampalavanar says he did not know of them, but I do not believe him. I am of opinion that every bidder must know that there is this possibility of the flaw in the knockdown bid and that the sale is not finished until the deposit is accepted and the contract signed. Ampalavanar's departure when Selvadurai and the others went to the Registry is not different than if he had left during the actual bidding. Condition 3 seems to have been modelled on section 305 of the Civil Procedure Code. This section corresponds with 0.21 r .84 of the Indian Code (formerly section 306) and in the case of *Bhim Singh* v. *Sarwan Singh*, (1889) 16 Cal. 33 at page 38, Norris, J., says:—

> "The word 'forthwith' is worthy of special attention. The sale is not to be adjourned; the putting up of the property again and soliciting fresh bids is a continuation of the original sale, a part and parcel of the proceedings which had their origin in the first putting up of the property, and which do not come to an end until the property has been knocked down to a purchaser and that purchaser has made the statutory deposit."

I do not think that the case of *Vallabhan* v. *Pongunni*, (1889) 12 Mad. 454, in any way conflicts with this ruling because that case only decided that such a sale is a re-sale under section 293 of the Code (section 293 in our Code) for the purpose of rendering the defaulting purchaser liable for a deficiency. The two cases are distinguished at page 458 in the judgment. I can find no later cases than these, and they appear to have been accepted and acted on in India for a considerable time. I think that *Bhim Singh* v. *Sarwan Singh* (*supra*), should be followed here.

This is sufficient, I think, to decide the case. But there is one other point raised which I think I should deal with briefly.

Mr. Joaquim argued that the suit was wrongly brought. Section 254 (i) (c) provides that:—

> "The following questions shall be determined by order of the Court executing a decree and not by a separate suit—namely.....(c) any other questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution discharge or satisfaction of the decree or to the stay of execution thereof."

He relied on a previous decision reported in III Malayan Law Journal page 93 where it was held that an order under section 149 of the Land Code, 1926 is within the definition of the word "decree" in the Civil Procedure Code. If that is correct, I think that Mr. Joaquim's argument would be correct, but Mr. Hastings pointed out that in that judgment I had not been referred to or considered section 40 of the Civil Procedure Code, which seems to me fatal to the conclusion I there formed; nor to the decision of the Court of Appeal in *Chettiappah Chettiar* v. *Raja Abdul Rashid*, (1931-1932) F.M.S.L.R. 345, where the words of the judgment at page 347 would also seem to be in direct contradiction to the judgment Mr. Joaquim wishes to rely on. A lot of time was spent on argument of this point and its consequences, but I think that for these two reasons it is impossible to say that the suit should have been disposed of under section 254 and I think that the plaintiff rightly framed this action. On my view of the facts, however, the point has lost its importance. It was agreed at the trial that this point would affect the question of costs only if plaintiff won, and neither party wished the point to interfere with the decision on the merits.

I think, therefore, that the suit should be dismissed with costs.

Judgment accordingly.

NOTE.—There was an appeal against this decision, and the only point taken was whether the property had been put up for sale again "forthwith." The appeal was heard on the 10th May, 1934, before Thomas, C.J., Sir Walter Huggard, C.J., Straits Settlements and Mudie, J. All the Judges of the Court of Appeal delivered oral judgments on the 11th May, 1934, dismissing the appeal.—*Editor.*